



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 438 OF 2015

(Before Hon. Justice Mathews N. Nduma)

FRANCIS ODERO OKELLO.....CLAIMANT

VERSUS

KENYA POWER AND LIGHTING COMPANY.....RESPONDENT

JUDGMENT

1. The claimant was employed as a casual laborer by the respondent sometimes in September 2003.
2. On 16th April to May 2007, the respondent took the claimant for skills training and he acquired a certificate of training from the respondent's training school at Ruaraka.
3. It is the claimant's testimony that the respondent had a policy of confirming employees to permanent employment on a first come first serve basis. The claimant was employed on a fixed term contract at the Ruaraka Depot at a basic salary of Kshs. 8,293 and house allowance of Kshs. 1,464 per month. The contract was dated 29th June 2011.
4. The claimant's salary was adjusted to Kshs. 9,122 and house allowance of Kshs. 1,830 in a contract dated 29th February 2012. The claimant's pay slip showed that his retirement date would be 29th September 2042. The respondent deducted NSSF and NHIF dues from the claimant's salary but did not remit the same.
5. On or about 30th March 2012, the claimant's services were terminated verbally by one Boniface Kamuso on instructions from the supervisor Mr. Kinyua and assistant Engineer Mr. Osano.
6. The claimant testified that relatives of the senior staff who were employed after him were placed on permanent terms. He alleges that this amounted to discrimination.
7. The claimant further testified that he had served the respondent continuously for a period of eight (8) years before his employment was reduced to a fixed term contract on 29th June 2011. The claimant states that his termination from employment was discriminatory, unlawful and unfair and was not for a valid reason nor done following a fair procedure.
8. The claimant prays for terminal benefits enumerated as follows:
 - (a) One month salary in lieu of notice Kshs. 10,952.
 - (b) Severance pay for 7 years calculated at 15 days salary per each completed year of service in the sum of Kshs. 44,229.23.
 - (c) Unpaid leave for 7 years in the sum of Kshs. 76,664.
9. The claimant further seeks damages for unfair termination made up of unpaid salary from date of termination to the date of retirement and General damages for discrimination in the sum of Kshs. 6,500,000.00.

Response

10. The suit was defended by a memorandum of Response filed on 15th May 2015 in which the particulars of employment as a casual and

training at Ruaraka training school is admitted. The respondent admits also having placed the claimant on a two months fixed contract on 1st July 2011 to 31st August 2011 and a further two months contract on 29th February 2012 which contract was to run from 1st March 2012 to 30th April 2012.

11. The respondent states that the employment of the claimant then lapsed upon expiry of the two months contract on 30th April 2012.
12. That on 26th April 2012, the claimant was paid his final dues as per the pay slip for the month of April 2012 in the sum of Kshs. 10,540 less NHIF and NSSF deductions.
13. The respondent further stated that no demand or notice of intention to sue was served on the respondent before the suit was filed.
14. The respondent prays that the suit be dismissed with costs.
15. In his sworn testimony, CW1 the claimant stated that he worked as a casual as a lines man in the construction department from 2003 up to April 2012. The claimant testified that his last fixed term contract was not renewed. That he worked as a casual for a period of seven (7) years but his colleagues were employed on permanent terms. He testified that he was not paid service pay and though NSSF was deducted from his salary it was never remitted.
16. That he did not go on leave for 7 years since he was termed a casual and was not paid in lieu of leave days not taken. The claimant stated that he had no one to support him to get permanent employment like his colleagues who came after him and were employed permanently. That he did not get a certificate of service. The claimant was still unemployed. He did occasional jobs as an electrician in his rural home.
17. CW2 was Thomas Okoth Obwayo who testified that he worked with the claimant for the respondent. That their employment was terminated without notice. That there was discrimination at the work place. CW2 had a fixed term contract which ended on the same day with that of the claimant. That their colleagues were confirmed to permanent terms.
18. RW1, Kipyegon J. Chepkwony testified that he was a Human Resource Officer of the respondent. He testified that the claimant was on a fixed term contract which expired and was not renewed. That the claimant was paid his final dues and was not owed anything. RW1 stated that NSSF and NHIF was deducted and remitted in October and November 2010. RW1 later said he was not sure if NSSF was remitted. Under cross examination, RW1 said NSSF is not paid for casuals but NHIF is deducted and remitted. RW1 said that as a casual the claimant had a weekly rate which was paid at the end of the month. RW1 stated that the claimant had a staff number. RW1 stated that claimant was trained to do the job he did. That no termination notice was required since the claimant's fixed term contract expired. RW1 denied that the respondent discriminated employees. RW1 added that retirement date on the pay slip did not mean that the claimant was to work up to that date.

Determination

19. The issues for determination are:

- (a) Whether the termination of the employment of the claimant was for a valid reason and followed a fair procedure.
- (b) Whether the claimant has proved he was discriminated against.
- (c) Whether the claimant is entitled to the reliefs sought.

Issue (a) and (b)

20. It is not in dispute that the claimant served as a 'casual' for a period of seven (7) years. During the time, NSSF was not deducted from his salary until he was placed on a fixed term contract in the year 2011. The claimant did not go on leave during the period since he was regarded as a casual. The claimant was later placed on a two month fixed term contract which fact is not in dispute. The fixed term contract was extended for a further two months to expire on 30th April 2012. This fixed term contract was not renewed and the claimant's employment ended that way.
21. The claimant has not pleaded unfair labour practice under *Article 41 of the constitution of Kenya 2010*. Had he done so, the court would have considered whether the conduct by the respondent to keep the claimant as a casual for a period of seven (7) years only to reduce the employment to a two months fixed contract for purposes of terminating the employment amounted to unfair labour practice and therefore wrongful and unfair.
22. The claimant however pleaded discrimination by the respondent contrary to *Section 5(3) of the Employment Act*, as read with *Article 27(4) of the constitution of Kenya 2010*. The claimant did not adduce sufficient evidence to meet the threshold established in **VMK vs CUEA (2013) eKLR** which the claimant relied on. The court finds that the claimant did not prove that the respondent discriminated against him by failing to employ him permanently on a balance of probabilities. The claim for damages for discrimination therefore fails.
23. Equally, it is not in dispute that the employment of the claimant ended upon expiry of a fixed term contract on 30th April 2012. The claimant has failed to prove that the termination of his employment was wrongful and unfair. The fixed term contract simply expired. The claim for damages for unlawful and unfair termination also has failed in the circumstances of the case.

Issue (c)

24. The next question for determination is whether the claimant has proved that he is entitled to the various terminal benefits sought.

Notice pay

25. With regard to the claim for one month salary in lieu of notice, the fixed term contract dated 29th February 2012 had under paragraph (d) indicated that the last working day for the claimant was 30th April 2012. There was no need to further give any more notice to the claimant or pay in lieu of notice. This claim therefore fails.

Severance pay

26. The claimant has proved that he served the respondent continuously for a period of seven (7) years during which period the respondent wrongfully regarded him as a casual and therefore did not deduct nor remit NSSF on his behalf. The claimant has proved that he is entitled in terms of *Section 35(5) of the Employment Act 2007*, to service pay equivalent to 15 days salary for each completed year of service in the sum of Kshs. 55,229.93. The court awards the claimant accordingly.

Unpaid leave

27. The claimant has also proved that he was not granted leave for the seven (7) years because he was wrongfully regarded a casual. The claimant is granted Kshs. 76,664 in lieu of untaken leave days during the period.

28. The rest of the claims by the claimant have not been proved and are dismissed.

29. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:

(a) Kshs. 44,229.93 service pay.

(b) Kshs. 76,664 in lieu of untaken leave

Total award Kshs. 120,893.93

(c) Interest at court rates from date of filing suit till payment in full.

(d) Costs of the suit.

Judgment Dated, Signed and delivered this 16th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Claimant in person

Mr. Mbogo for Respondent

Chrispo – Court Clerk